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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-515

BARBARA A. GREEN, as Administratrix and personal representative of the Estate of Michael Ray Green, deceased; and for the use and benefit of Barbara A. Green, surviving spouse, and Michael Ray Green, II, a minor dependent, and Charles Anthony Laphan, a minor dependent of Michael Green, deceased,

Petitioner,

v.

HARRY J. ROSS and THE TRAVELERS INDEMNITY COMPANY, a foreign corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Barbara A. Green, as Administratrix and personal representative of the Estate of Michael Ray Green, deceased, etc., et al, prays for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered June 21, 1973.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida reported at 338 F. Supp. 365 and the opinion of the United States Court of Appeals for the Fifth Circuit entered June 21, 1973, not yet officially reported, appear in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit printed in Appendix A hereto was entered on June 21, 1973. This Petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

QUESTION PRESENTED

1. Is a claimant who has invoked the jurisdiction of a federal district court under the general maritime law pursuant to *Moragne* v. *States Marine Lines,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) upon a claim that is neither historically nor peculiarly maritime in nature entitled to a trial by jury?

STATEMENT OF THE CASE

On June 12, 1971, Petitioner's husband, Michael Ray Green, deceased, was skin diving about two miles east of Elliott Key in the Atlantic Ocean when he was struck in the head by the propeller of a 17-foot outboard motorboat operated by one Harry J. Ross. Michael Ray Green died shortly thereafter as a result of these injuries.

Barbara A. Green, as Administratrix and personal representative of the Estate of her deceased husband, Michael Ray Green, brought suit against Harry J. Ross and The Travelers Indemnity Company alleging

that her husband's death was caused by the negligence of Harry J. Ross, the operator of the outboard motorboat. Petitioner invoked the admiralty and maritime jurisdiction of the district court to hear her claims arising under federal maritime common law and under the Florida Wrongful Death Act. The claim for wrongful death recovery under general maritime law was founded upon this Court's decision in *Moragne* v. *States Marine Lines,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970).

Petitioner's original Complaint contained a demand for trial by jury. Defendants timely filed a motion to strike this demand and said motion was granted by the trial court in a reported opinion at 338 F.Supp. 365 which is set forth in Appendix A hereto.

After a non-jury trial, the district court concluded that the Defendant Harry J. Ross was not negligent in causing the death of Michael Ray Green, deceased. Petitioner appealed the trial court's decision to the United States Court of Appeals for the Fifth Circuit raising the denial of jury trial as error. The Fifth Circuit Court of Appeals affirmed the judgment of the trial court in an opinion dated June 21, 1973, which is set forth in Exhibit A herein.

REASONS FOR GRANTING THE WRIT

Jurisdiction of the federal district court in this cause was invoked under the general maritime law pursuant to *Moragne* v. *States Marine Lines,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970). In *Moragne* this Court held that a wrongful death action could be brought in admiralty under the general maritime law. Specifics were not given in the opinion but it was left to the district courts to spell out the elements of this

newly-created "cause of action." Although Petitioner's claim was not historically or peculiarly maritime in nature, she was able to invoke the admiralty jurisdiction of a federal district court pursuant to the *Moragne* decision. She continually requested, but was denied, a trial by jury. Since the reporting of the decision in *Moragne,* this Court has not ruled whether or not a claimant invoking this newly-created jurisdiction of the federal courts is entitled to a trial by jury. Many claimants all over the country have and will continue to file actions in the federal district courts under *Moragne* on claims which are not historically or peculiarly maritime in nature and under circumstances where federal jurisdiction did not heretofore exist. The bench and bar are in need of guidance from this Court as to whether or not these claimants will be entitled to trial by jury.

Petitioner is well aware of the historically rooted principle that an admiralty claimant has no right to jury trial. It has long been held that the Seventh Amendment to the Constitution applies only to actions at "common law," and does not apply to civil admiralty cases. Supposedly, this result was the deliberate choice of the people at the time the nation was founded, the Founding Fathers being of the opinion that "jurisdiction of transactions so peculiar as those of the sea (should) be exercised by judges schooled in the principles and mystery of such transactions." Benedict on Admiralty, Vol. 2, Sec. 224, Page 33 (6th Ed.). But with the expansion of admiralty jurisdiction through the *Moragne* decision, it becomes evident that it is time for a re-evaluation of the historical precedence and the present policy reasons behind the wholesale denial of trial by jury in admiralty actions where such right is

not expressly provided by statute. In the instant case, a man was killed while skin diving when he was run over by a small outboard motorboat. This case had nothing whatever to do with "mysterious transactions of the sea," and therefore the purported historical reason for denying trial by jury was inapplicable.

A recent judicial review of the historical development of admiralty law and jurisdiction has shed some doubt on the historical precedent behind the denial of jury trial in admiralty proceedings. In *Close* v. *Calmar Steamship Corp.*, 44 F.R.D., 398 (E.D.Pa. 1968), the court, after exhaustive research, concluded

> "That there is neither an inherent incompatability between admiralty procedure and jury trial, nor any consistent historical practice excluding juries from admiralty suits." 44 F.R.D. at 403.

Independent admiralty courts were established in England around the middle of the 14th century. The jurisdiction of such courts was strictly limited to cases of piracy. Juries in local seaports had been reluctant to convict their fellow seamen of piracy where a foreign vessel had been plundered, and when convictions did not ensue, the Crown was often required to pay reparation to the nation whose ships had been the victims. Admiralty courts were thus established so that royal officials more sympathetic to the Crown would decide these piracy matters. Vice-admiralty courts were also established in the colonies to aid in the enforcement of the unpopular trade and navigation statutes. The non-jury procedure of these admiralty courts met unfavorable reaction in both England and the colonies. The growth of the admiralty courts in England was effectively curtailed, and at the time of the American

Independence, admiralty jurisdiction in England was limited to prize cases and cases involving contracts made at sea to be performed at sea. All other maritime matters were adjudicated in common-law courts before juries. See *Close, supra,* at 402-404.

Jurisdiction of admiralty courts was not as clearly defined in the United States at the time of Independence as it was in England. Even though at the time of the adoption of the Constitution at least eight of the colonies were using jury trials in admiralty cases, the subject of admiralty jurisdiction does not seem to have been discussed at the Constitutional Convention at all. See *Close, supra,* at 404.

The *Close* case shows us that the historical arguments usually raised in favor of the denial of the right to jury trial in admiralty proceedings lack substance and validity.

It is not the position of the Petitioner in this case that this Court should declare that in *all* admiralty proceedings all parties have a general right to a trial by jury. The Petitioner's position is much more limited. The Petitioner would have this Court rule that where a claimant has invoked the jurisdiction of a federal district court under the general maritime law, such claimant would have the right to a jury trial if that claim is one that is neither historically nor peculiarly maritime in nature. With the ever-expanding admiralty jurisdiction of the federal courts, there is no historical precedent nor present policy reason for continuing the general denial of jury trial on all such claims. Certainly considerations of due process require a re-evaluation of this harsh rule.

Recent cases show that there is nothing sacred in the non-jury aspect of an admiralty proceeding. In *Fitz-*

gerald v. *United States Lines Company*, 374 U.S. 16 (1936), a seaman had brought an action against a shipowner for damages based on negligence and on unseaworthiness as well as an action for maintenance and cure. The lower court dismissed the Jones Act claim but made an award on the maintenance and cure action. This Court held that the seaman was entitled to a jury trial as of right on the maintenance and cure claim, a traditional admiralty remedy, when it was joined with a Jones Act claim providing for jury trial by statute. This case is significant because this Court noted that there was no statutory or constitutional obstacle to providing a jury trial in an admiralty claim and held that under certain circumstances, i.e., the joining of a non-jury trial claim with a claim entitled to jury trial by statute, a claimant would be entitled to a jury trial as a matter of right on a claim that was traditionally admiralty in nature. There is no doubt that this right to jury trial declared in *Fitzgerald* was a "court-created" right. Later interpretations of this case point this out.

> "However, the right to jury trial on admiralty claims joined with a Jones Act claim stems not from the merger of the civil and admiralty rules, but from a court-created right to trial by jury in such cases in the interest of the administration of justice." *Haskins* v. *Point Towing Company*, 395 F.2d. 737 (3rd Cir. 1968).

Later federal cases have expanded the *Fitzgerald* reasoning. In *Peace* v. *Fidalgo Island Packing Co.*, 417 F.2d 371 (9th Cir. 1969), a claimant brought a wrongful death action under the Jones Act on a negligence theory and also on the Death On The High Seas Act for unseaworthiness. Following *Fitzgerald*, the

court held that the claimant was entitled to a jury trial as of right on both of the claims set forth in the complaint. Older federal cases have followed the reasoning that there is no right to jury trial in admiralty unless it is expressly provided by a specific statute. The *Peace* case demonstrates how recent federal decisions have turned this reasoning around. The question in *Peace* was not whether a jury trial should be allowed in any particular admiralty action, but whether that right is expressly prohibited.

The *Fitzgerald* reasoning was further extended in *Bergeria* v. *Marine Carriers, Inc.*, 341 F.Supp. 1153 (E.D.Pa. 1972). In that case, a claimant brought an action under the Jones Act in which he was entitled to a jury trial as of right, pursuant to statute. The shipowner filed a motion to file a supplemental answer and counterclaim seeking recovery of maintenance and cure payments allegedly procured by fraud. The court held that the counter-claimant was entitled to trial by jury as a matter of right on this traditionally maritime claim.

The principle that jury trials are not allowed in admiralty actions as a matter of right was officially discarded by the recent case of *Close* v. *Calmar Steamship Corp.*, *supra*. In that case, suits were brought by several injured longshoremen against the owners of the ships upon which they were injured. The shipowners instituted completely separate actions against the stevedoring firms which employed the longshoremen on an indemnity theory, a traditional "admiralty" action. The shipowners moved to consolidate their indemnity actions with the longshoremen's original suits against them. The stevedoring firms did not oppose consolidation provided that there would be a jury trial on all

issues, and filed a motion in that regard. The shipowners opposed the motion for jury trial.

The court granted the motion for consolidation without much discussion, but considered the motion for jury trial in great depth. The court first noted that the argument that there is a constitutional right to trial of an admiralty case without a jury was specifically rejected by *Fitzgerald, supra.* The court then undertook a thorough examination of the history of admiralty law in America and England, which has been referred to above, and concluded that there was no inherent incompatability between admiralty procedure and jury trial, nor any consistent historical practice excluding juries from admiralty suits. But the exhaustive historical review was set lightly aside by the court, and it would appear that the question actually turned upon whether or not the shipowners' indemnity actions were peculiarly maritime in nature.

> "Finally the historical arguments of the shipowners are of little weight because the shipowners' current indemnity actions are not peculiarly maritime in nature nor have they ever been considered such. The actions technically can be considered admiralty actions because they involve the operational concerns of the shipping industry. . . . Special rules will therefore determine the obligations of the respective parties to the indemnity obligation . . . . But these 'special rules' are not technical niceties beyond the ken of juries." 44 F.R.D. at 405-406 (Citations omitted.)

The court noted that "the jury is the fact-finding tribunal preferred by the federal courts," 44 F.R.D. at 407, and granted the motion for jury trial on all issues of fact. The court was of the view that

> "It would be unrealistic to burden (these claims) with trappings traditionally associated with ad-

> miralty law but no longer supported by viable policy considerations." 44 F.R.D. at 407.

The decision in *Close* turned upon whether the actions for which a jury trial was requested were peculiarly maritime in nature. 44 F.R.D. at 405. That same reasoning should be applied to the instant case. Petitioner's decedent was killed while skin diving by being struck by the prop of a small outbound motorboat. This action is certainly not "peculiarly maritime" in nature nor can it be argued that such an action is historically an admiralty claim; in fact, prior to *Moragne,* the admiralty jurisdiction of the federal district court would not have encompassed Petitioner's claim. (Note that the *Close* decision was decided prior to *Moragne.*)

An argument was made in the *Close* case that any such significant change in trial procedure should be left to Congress, or at least to the Supreme Court. The court rejected this argument pointing out that *Fitzgerald* demonstrated the Supreme Court's willingness to forge new procedure, and noted that it would be necessary for the lower courts to rule upon such issues before the Supreme Court could ever hear them.

The argument that significant changes in trial procedure in the federal courts should not be undertaken by an inferior court obviously found favor with the Fifth Circuit Court of Appeals in the instant case.

> "On appeal, the appellant urges this court to abandon traditional admiralty practice and declare a right to jury trial in cases involving small craft operated by lay mariners on navigable waters since no 'blue water' expertise is required to resolve the issues. We decline to carve out this narrow excep-

tion to well-established procedural rules." Appendix A, Page 7a.

At footnote 6 following that cited portion of the opinion, the Fifth Circuit Court of Appeals indicated that it doubted that it would have the power to undertake such an "alteration" of federal procedure and that the power to grant Petitioner's requested relief would lie solely with this Court.

The Fifth Circuit Court of Appeals in the instant case followed the general rule that an admiralty claimant has no jury trial right unless he sues under a statute which expressly provides it, such as the Jones Act. The *Close* case shows that the historical basis for this rule is doubtful if not non-existent. Furthermore, recent federal cases show that a new approach is being taken to this problem and the question appears to be not whether a right to jury trial is expressly provided for in any particular action, but whether such right is specifically prohibited. The later cases are more logical, since there is no policy consideration in favor of maintaining a rule which has no basis for existence other than very questionable historical precedence. Particularly after *Moragne,* this rule unnecessarily causes injustice to those claimants who are deprived of the right to jury trial for no other reason than the fact that this rule exists. The *Moragne* result demands reconsideration and modification of this rule. As was stated by the Court of Appeals in *Blake* v. *Farrell Lines, Inc.,* 417 F.2d 264 (3d Cir. 1970).

> "The constitutional vesting of admiralty jurisdiction in the district court did not require the perpetuation of all historically characteristic principles, rules, and practices of admiralty, any more than the vesting of these same courts with

equitable powers precluded the subsequent modification of jurisprudence and practice in equity." 47 F.2d at 265.

It is the position of the Plaintiff that the results in *Moragne* demand a judicious reconsideration of precedent and a modification of the rule created by decision law that a claimant is not entitled to jury trial as of right in admiralty. With the expansion of admiralty jurisdiction by the *Moragne* decision, continued adherence to this rule is unjustified by history, reason, or present policy considerations.

CONCLUSION

For the reasons and authorities set forth above, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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